No. 84-1362 (8)

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1985

PUBLIC SERVICE COMMISSION OF MARYLAND,
*Petitioner,*

v.

THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF MARYLAND,
*Respondent.*

**On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit**

## BRIEF OF AMICI SUPPORTING RESPONDENT

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October 1985

## QUESTIONS PRESENTED

Section 401(b) of the Communications Act, 47 U.S.C. § 401(b), provides that any injured party may bring an enforcement action in federal district court against "any person" who violates "any order" of the Federal Communications Commission (other than one for the payment of money). The questions presented are:

1. Whether Section 401(b) embraces orders issued by the FCC in the course of rulemaking proceedings as well as FCC orders issued in adjudicatory proceedings.

2. Whether the Maryland Commission and its individual members are "persons" subject to an enforcement action under Section 401(b).

## TABLE OF CONTENTS





## TABLE OF AUTHORITIES

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### INTEREST OF AMICI

This brief is filed on behalf of American Telephone and Telegraph Company and the Bell Operating Companies of four independent regional systems: Ameritech, BellSouth, NYNEX, and Southwestern Bell.[1] The interest of amici is that they, like respondent C&P Telephone Company of Maryland, are subject to the FCC's depreciation decisions and have a direct interest in prompt and effective enforcement of those decisions under Section 401(b) the Communications Act, 47 U.S.C. § 401(b). Several of the amici are plaintiffs in Section 401(b) cases to

[1] The names of the amici companies are set forth in Appendix A (p. 1a, below), together with the listing required by S. Ct. R. 28.1 (p. 2a, below).

enforce depreciation decisions, including three cases now awaiting review in this Court.[2] Amici have filed with the Clerk of this Court written consents from both the petitioner and the respondent. S. Ct. R. 36.2.

## STATEMENT OF FACTS

### A. The Depreciation and Preemption Orders

Depreciation has always been a vital subject in the regulation of telecommunications.[3] As is true of most carriers and utilities, the telephone industry is capital intensive, and depreciation is therefore one of the largest expenses incurred in providing service. Without adequate provision for depreciation, the industry could not renew and modernize its plant.

In the Communications Act of 1934, 47 U.S.C. § 151, *et seq.* ("the Act"), Congress singled out depreciation for special attention. Section 220, 47 U.S.C. § 220, gives the FCC power to set depreciation for carriers subject to the Act and it forbids carriers from deviating from FCC determinations.[4] The FCC must consider the "views and recommendations" of the states (Section 220(i), 47 U.S.C. § 220(i)), but Congress rejected a proposed amendment [5] that would have allowed the states to set different depreciation rates in state proceedings. For decades, the FCC has maintained rules governing depreciation and, since the 1940s, has prescribed individual depreciation rates for larger carriers.

The present case has its origins in decisions made by the FCC in 1980 and 1981 ("the Depreciation Orders") affecting

[2] See Appendix B (p. 1b, below) for a complete listing of cases.

[3] Depreciation measures the loss of service value of a capital asset over time, and the carrier's annual depreciation expense is recovered through rates, together with other expenses of operation.

[4] See Sections 220(b) and (g), 47 U.S.C. §§ 220(b), (g).

[5] The pertinent legislative history is discussed in detail in the joint brief to be filed by the amici and others as respondents in No. 84-871, *et al.* (hereafter "Joint Brief").



depreciation in several important respects.[6] In these decisions, the FCC authorized carriers to employ the Straight-Line Equal Life Group ("SLELG") method for grouping items subject to depreciation; it approved the "remaining life" convention for correcting depreciation when estimates of useful life must be revised after an item of plant has been partly depreciated, and it ordered that certain expenditures for "inside wiring" be expensed rather than depreciated.[7] Many state commissions, including the Maryland Commission, participated in one or more phases of the FCC proceeding that led to the Depreciation Orders. *E.g.*, 83 F.C.C.2d at 269 n.1.

After the FCC adopted its Depreciation Orders, NARUC [8] and California sought reconsideration, urging the FCC to hold that the state commissions need not respect these new depreciation rules in intrastate rate proceedings. Ruling on this request in 1982, the FCC reaffirmed that it could require the states to respect federal depreciation rules; however, by a 4-to-3 vote, the FCC found no present need to exercise that authority.[9] AT&T and GTE then sought reconsideration. They showed that states were already beginning to reject SLELG and remaining life, and they urged the FCC to require the states to respect the Depreciation Orders.[10]

[6] *In re Amendment of Part 31*, 83 F.C.C.2d 267 (1980), *recon. denied*, 87 F.C.C.2d 916 (1981); *In re Amendment of Part 31*, 85 F.C.C.2d 818 (1981).

[7] The changes, discussed in the Depreciation Orders (p. 3, n.6, above), are described in greater detail in the Joint Brief.

[8] NARUC is the National Association of Regulatory Utility Commissioners.

[9] See *In re Amendment of Part 31*, 89 F.C.C.2d 1094 (1982). As the FCC later explained, it believed that the states would continue to follow FCC depreciation determinations as they have done in the past, without need for a mandatory order. See *In re Amendment of Part 31*, 92 F.C.C.2d 864, 866-67 (1983).

[10] AT&T filed a petition for reconsideration in the on-going rulemaking proceeding. GTE filed a separate request with the FCC for a declaratory order, addressing the refusal of the Ohio Commission to permit the use of SLELG and remaining life. Such a declaratory order proceeding is technically classified as an adjudication under the APA classification. See p. 14, n.38, below. The FCC consolidated the two requests and disposed of them in the same decision.

By order released in January 1983 ("Preemption Order"), the FCC unanimously ordered that its depreciation decisions be respected by the states.[11] The FCC pointed out that the same telephone plant is used interchangeably for interstate and intrastate communication. 92 F.C.C.2d at 877. It explained that its new depreciation rules were needed to make more accurate depreciation determinations, encourage modernization of telephone plant, and achieve better service for the public. *Id.* at 876-77. Because the same plant of the same carriers is involved in both FCC and state ratemaking proceedings, the FCC found that the states' use of inconsistent depreciation methods would frustrate essential national policy for telecommunications. *Id.*

A number of state commissions sought review of the Preemption Order in the Fourth Circuit pursuant to statutory direct review provisions.[12] None of the states sought a stay of the Preemption Order from the Fourth Circuit, and it therefore became effective in early 1983. The FCC also began, in its regular prescriptions of depreciation for larger telephone companies, to employ SLELG and remaining life in determining depreciation rates for those companies. In June 1984, the Fourth Circuit affirmed the Preemption Order.[13]

### B. Section 401(b) Enforcement Proceedings

Although many states respected the FCC's directive that SLELG and remaining life be permitted, other state commissions refused to do so. The reason for their resistance is that SLELG and remaining life, as compared to the methods they replaced, often increase the amount of depreciation recognized

[11] *In re Amendment of Part 31, supra,* 92 F.C.C.2d at 879-80. That order is under review in this Court in No. 84-871, *et al.*

[12] Section 402(a) of the Act, 47 U.S.C. § 402(a), provides that proceedings to review "any order" of the Commission (except for a narrow class of broadcast license-related orders) should be brought pursuant to the Hobbs Act, 28 U.S.C. § 2341, *et seq.* The Hobbs Act gives the court of appeals "exclusive" jurisdiction over proceedings to review FCC orders. 28 U.S.C. § 2342.

[13] *Virginia State Corporation Comm'n* v. *FCC,* 737 F.2d 388 (1984), *appeal and cert. pending,* No. 84-871, *et al.*



in earlier years and decrease the amount recognized in later years.[14] It is a fact of political life that state commissions are often under extreme local pressure to resist temporary increases in utility or carrier rates even if the effect of the increases would be to produce lower rates and better service over the long term.

Accordingly, a number of state commissions flatly refused to accept the FCC's depreciation decisions. The Maryland Commission, for example, rejected the use of SLELG and remaining life by C&P Telephone Company of Maryland ("C&P"), holding that the "depreciation practices established by the FCC in no way limit this Commission's authority . . . ."[15] Similarly, the Maine Commission objected to the use of remaining life by New England Telephone and Telegraph Company, holding that "the FCC erred" in its Preemption Order.[16] Such state-commission action imposes substantial and irreparable injury on the carriers; in the present case, for example, C&P showed that such injury amounted to $16.1 million in lost revenues in the first year.

Section 401(b) of the Act, 47 U.S.C. § 401(b), provides, with a single exception, for federal district court enforcement of "any order" of the FCC.[17] Section 401(b) states that if "any person" fails to obey "any order" of the FCC (other than for payment of money), the Attorney General, the FCC, or "any party injured thereby" may seek enforcement in district court. If the district court determines that the order was "regularly made and duly served" but is being disobeyed, then the statute directs that the district court "shall enforce obedience" by an appropriate injunction. *Id.*

[14] SLELG and remaining life are methods used to obtain more accurate measurement of straight line depreciation. They replace older methods that often deferred recovery of depreciation.

[15] *In re Application of C&P of Maryland,* No. 7661, Feb. 18, 1983, p. 18.

[16] *New England Telephone and Telegraph Co.,* No. 82-124, Apr. 26, 1983, p. 36.

[17] Orders for the payment of money are enforced through a different set of procedures under Section 407, 47 U.S.C. § 407.

In this case, C&P brought suit under Section 401(b) in Maryland District Court, naming both the Maryland Commission and the individual commissioners as defendants. Complaint (J.A. 8).[18] C&P sought an injunction directing the defendants to permit C&P's use of SLELG and remaining life. Following a number of other district courts that have granted such injunctions under Section 401(b), the Maryland District Court granted the injunction. 560 F. Supp. 844 (Pet. App. 11a). On review, the United States Court of Appeals for the Fourth Circuit unanimously affirmed. 748 F.2d 879 (Pet. App. 1a).

The Fourth Circuit rejected two legal objections made by the Maryland Commission which the agency renews in this Court. First, the Maryland Commission argued that Section 401(b) is limited to enforcing orders issued in adjudicatory proceedings and does not embrace orders issued in rulemaking proceedings. Like most other courts construing Section 401(b) (see p. 10, below), the Fourth Circuit held that the Preemption Order did constitute an "order" within the meaning of Section 401(b).[19]

Second, Maryland argued that a state commission cannot be regarded as a "person" under Section 401(b). That view was accepted by one district court but rejected by at least six other courts in Section 401(b) cases. See p. 17, below. The Fourth Circuit held that the injunction would be effective against the individual commissioners as persons even if the state commission itself were dismissed as a party. 748 F.2d at 881 (Pet. App. at 4a). It also held that a state commission is a person under Section 401(b). *Id.*

This case is only one of a number in which injunctions to enforce the FCC's Depreciation and Preemption Orders were

[18] References to "J.A." are to the Joint Appendix in this case. References to "Pet. App." are to the Appendix to the Maryland Commission's Petition for Certiorari.

[19] The only court known to have accepted the distinction urged by the Maryland Commission is the First Circuit. *New England Telephone and Telegraph Co.* v. *Public Utilities Commission of Maine*, 742 F.2d 1 (1st Cir. 1984), *petition for cert. filed*, No. 84-900.



sought under Section 401(b). Such injunctions were granted by almost all of the district courts.[20] Rulings directing or sustaining such injunctions were issued by the Fourth Circuit, the Fifth Circuit, and the Eighth Circuit; only the First Circuit refused to do so. See pp. 1b-2b, below. In parallel litigation under Section 401(b), the Seventh Circuit upheld a preliminary injunction under Section 401(b) to enforce another FCC order against a state commission and its members.[21]

The FCC itself participated as an amicus in a number of the Section 401(b) cases, generally supporting the injunctions. It explained that its own limited resources prevented the FCC from seeking injunctions in every case of disobedience (see pp. 12-13, below), and it endorsed the use of private actions under Section 401(b). Similarly, filing as an amicus in companion cases in this Court, the Solicitor General has taken the position that private parties should be permitted to enforce the kind of orders involved in this case.[22]

## SUMMARY OF ARGUMENT

1. Section 401(b) of the Communications Act authorizes any party to bring an enforcement action in federal district court against "any person" that disobeys "any order" of the FCC, except for the payment of money. The language of the statute does not distinguish between orders issued in rulemaking proceedings and orders issued in adjudications, and neither the statute nor its legislative history suggests that Congress intended to create an exception to the remedy in Section 401(b) by excluding FCC rulemaking orders.

[20] Such injunctions were granted by District Courts in Kansas, Iowa, Louisiana, Maine, Maryland, Montana, Wisconsin and Washington. The Vermont District Court refused to issue such an injunction and the case became moot while on appeal to the Second Circuit. The Arkansas District Court initially refused to do so but was reversed by the Eighth Circuit. See p. 1b, below.

[21] *Illinois Bell Telephone Co.* v. *Illinois Commerce Comm'n*, 740 F.2d 566 (7th Cir. 1984).

[22] Brief for United States as *amicus curiae* in No. 84-483, *et al.*, p. 12.

The Maryland Commission's proposed construction of the term "order" has been rejected by the agency responsible for the administration of the Act as well as by the Fourth Circuit, the Fifth Circuit and a number of District Courts. It also conflicts with this Court's decision in *CBS* v. *United States*, 316 U.S. 407 (1942), in which this Court held that the word "order," in an adjacent section of the Act governing judicial review, *does* embrace orders issued in rulemakings. Furthermore, construing Section 401(b) in accordance with its plain meaning will advance the remedial purposes of the statute, and prevent gaps in the statute's regime for court enforcement.

2. Section 401(b) permits enforcement actions to be brought in federal court against state commissions and their individual members when they disobey an order of the FCC. Individually named state commissioners are clearly "persons" who are subject to enforcement actions under Section 401(b). This reading not only accords with the language of the Act but implements the settled principle that federal courts may order prospective non-monetary relief against individual state officers who violate federal law. *Ex parte Young*, 209 U.S. 123 (1908).

State commissions also are "persons" subject to enforcement actions under Section 401(b), although the effective outcome would not be changed if the injunction ran only against the commissioners. The plain intent of the statute is that enforcement actions shall be available against any natural or legal entity that violates any order of the FCC. State commissions, no less than other actors, jeopardize federal policy when they ignore FCC directives.

## ARGUMENT

### I. THE PREEMPTION ORDER IS AN ENFORCEABLE ORDER UNDER SECTION 401(b).

The Preemption Order, enforced below in this case, is an "order," in both form and substance, within the conventional



understanding of that term.[23] Nevertheless, the Maryland Commission argues that Section 401(b) applies only to adjudicatory orders and does not permit enforcement of orders issued in rulemaking proceedings. Such a distinction is inconsistent with the language and aim of the statute, prior precedent, and the FCC's own construction of the Act. The policy arguments urged by Maryland neither support the distinction it advocates nor apply to this case.

#### A. Section 401(b) Includes "Any Order" Other Than One for the Payment of Money.

In plain terms, Section 401(b) authorizes "any party injured" to bring an enforcement action in district court against "any person" who disobeys "any order" of the FCC except an order for the payment of money. This Court has repeatedly said that the statutory language is the first and best evidence of Congress' intent.[24] Section 401(b) expressly includes "any" non-money order and makes no distinction between orders issued in rulemaking proceedings and orders issued in adjudications.

Where Congress did want to create an exception to Section 401(b), it said so explicitly, by providing that orders "for the payment of money" are not embraced by the section. Because Congress has drawn its statute with precision, "evidence of . . . legislative intent" is required before a court adds "additional exceptions" nowhere expressed in the statutory language. *Andrus* v. *Glover Construction Co.*, 446 U.S. 608, 616-17 (1980). Yet the Maryland Commission has not cited the barest

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[23] The Preemption Order is specifically designated by the FCC as an "order" (92 F.C.C.2d at 864), it contains ordering clauses (*id.* at 880), it is directed specifically to known parties (*id.*), and it definitively determines legal rights and responsibilities.

[24] *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 201 (1976); *FTC* v. *Bunte Bros.*, 312 U.S. 349, 350 (1941); *Caminetti* v. *United States*, 242 U.S. 470, 485 (1917).

scrap of legislative history to suggest that Congress intended there to be a second exception to Section 401(b).[25]

The construction urged by the Maryland Commission has been squarely rejected by the FCC. That agency is responsible for the administration of the Act and an agency's views are normally accorded substantial weight in the construction of its own statute.[26] Maryland's reading has also been rejected by the Fourth Circuit (748 F.2d at 881 (Pet. App. at 4a-5a)), the Fifth Circuit (744 F.2d at 1115-19), and each of the district courts that has addressed the issue.[27] Only a single opinion, rendered by the First Circuit (742 F.2d at 4-11), offers any support to Maryland.

The First Circuit decision, so far as it rests on statutory language, relies not on Section 401(b) but on a specialized distinction between "rules" and "orders" made twelve years later in the Administrative Procedure Act ("APA"), 5 U.S.C. § 551. Those APA definitions were drawn for a specific and limited purpose, namely, to specify the *internal* procedures to be followed by agencies in different kinds of administrative proceedings.[28] The definitions were adopted "for the purpose of [the APA]" (5 U.S.C. § 551, first sentence) and not as a gloss

[25] Although the Maryland Commission (Md. Br. 33-34) cites several cases that it claims restrict enforcement actions to adjudicative orders under the predecessor of Section 401(b) (former Section 16(12) of the Interstate Commerce Act, now 49 U.S.C. § 11705(a)), that assertion is not supported by a single one of the cited cases, as a reading of the cases quickly discloses. In fact, Section 16(12) has been used to enforce rulemaking orders. See, *e.g.*, *United States* v. *City of Jackson, Mississippi*, 318 F.2d 1, 9 (5th Cir. 1963).

[26] *Chevron U.S.A.* v. *National Resources Defense Council*, 104 S. Ct. 2778 (1984); *Blum* v. *Bacon*, 457 U.S. 132 (1982); *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367 (1969).

[27] These are the district courts in Louisiana (570 F. Supp. at 232), Maine (570 F. Supp. at 1571-77), and Washington (565 F. Supp. at 21). The opinion of the District Court in Maine was reversed by the First Circuit (742 F.2d 1).

[28] For this purpose, the APA defined the terms "rule" and "order" so that, in several respects, they are contrary to ordinary usage. A rule, for example, includes prescription of future rates for an individual company, and an order is defined to include a license. 5 U.S.C. § 551. When the APA turned its attention to judicial review it abandoned the distinction and spoke solely of "agency action." 5 U.S.C. §§ 701-05.



on other statutes. This Court has held that terms cannot be mechanically transferred from one statute to another without regard to the different contexts involved.[29] Even after the APA, Congress has repeatedly used the term "order" in a variety of statutes to include orders issued in rulemaking proceedings.[30]

The reading of Section 401(b) adopted by the Fourth and Fifth Circuits is supported by this Court's own decision in *CBS* v. *United States*, 316 U.S. 407 (1942). There, this Court construed the identical language at issue in this case ("any order"), as it appears in the very next section of the Communications Act—Section 402(a)—and this Court held that the quoted language does embrace orders issued in FCC rulemaking proceedings.[31] A similar interpretation of Section 401(b) is warranted by the "natural presumption that identical words used in different parts of the same Act are intended to have the same meaning."[32]

This "natural presumption" has special force in the present case. Section 401(b) and Section 402(a) are not merely adjacent sections in the same subchapter but both sections use the term "order" in determining whether and when parties are entitled to bring suit respecting FCC actions.[33] The anomaly of

[29] *E.g.*, *United States* v. *American Bldg. Maintenance Industry*, 422 U.S. 271, 277 (1975); *Walling* v. *Portland Terminal Co.*, 330 U.S. 148, 150 (1947).

[30] *E.g.*, *Motor Vehicle Mfrs. Ass'n* v. *State Farm Medical Automobile Ins. Co.*, 463 U.S. 29, 34 (1983); *Gage* v. *AEC*, 479 F.2d 1214, 1218-19 (D.C. Cir. 1973); *Philadelphia Co.* v. *SEC*, 164 F.2d 889 (D.C. Cir. 1947), *cert. denied*, 333 U.S. 828 (1948); *Sima Products Corp.* v. *McLucas*, 612 F.2d 309 (7th Cir.), *cert. denied*, 446 U.S. 908 (1980).

[31] In *CBS*, the network brought suit to challenge the validity of two orders of the FCC promulgating the so-called chain broadcasting regulations. Section 402(a), on which the suit was premised, permitted actions to review "any order" of the FCC except those involving licenses. Permitting the suit to proceed, this Court held in *CBS* that the phrase "any order" in Section 402(a) did embrace orders promulgated in a rulemaking proceeding.

[32] *Atlantic Cleaners & Dyers, Inc.* v. *United States*, 286 U.S. 427, 433 (1932). Accord, *Director, Office of Workers' Compensation Programs* v. *Forsyth Energy, Inc.*, 666 F.2d 1104, 1107 (7th Cir. 1981).

[33] The Maryland Commission says that *CBS* rests on a presumption that agency decisions are reviewable; but it should also be presumed that agency decisions are enforceable.

the First Circuit's reading, and its departure from *CBS*, is underscored by the result: under the First Circuit's decision, the Preemption Order would be an order (under Section 402(a)) so that any state could seek direct judicial review of it; yet it would not be an order (under Section 401(b)) if a state commission chose to disobey it and to resist an enforcement action. This kind of asymmetry makes no sense.

The reading urged by the Maryland Commission would also open a gap in the provisions for court enforcement of the Communications Act and the FCC's directives. Section 401(a) provides expressly for mandamus actions to enforce provisions of the Act itself, and Section 401(b) provides for injunctive actions to enforce FCC orders. There is no separate statutory provision providing for court actions to enforce FCC orders issued in rulemaking proceedings. If Section 401(b) were read to exclude such rulemaking orders, as the Maryland Commission urges, it would mean that Congress had neglected to provide for Court enforcement of a major class of agency directives. It defies common sense to attribute such an intention to Congress.[34]

In providing for injunction actions by "any party injured" by violation of an FCC order, Congress made clear its intent to enlist private enforcement to supplement the limited enforcement resources of the agency. The FCC in turn has welcomed private actions under Section 401(b) to enforce its Preemption Order. As it advised the First Circuit:

> "The very justification for a private enforcement statute such as Section 401(b) is that the agency may not have the resources to police every violation of its orders and that aggrieved private parties with something at stake can help it with its job." [35]

[34] The First Circuit was led astray on this point because it assumed that rules or orders issued in rulemaking proceedings can be enforced by mandamus actions under Section 401(a). 742 F.2d at 9. Section 401(a), however, applies expressly only to violations of the Act's own provisions. Although conduct violating such an FCC rule or order might also happen to violate the Act itself, nothing in the statute converts every violation of a rule or order into a violation of the Act. Compare Sections 501-02, 47 U.S.C. §§ 501-02 (setting different penalties for statutory and rule violations).



Here, the FCC had made the policy decisions, which were its main responsibility, in the Depreciation Orders and the Preemption Order. By policing individual violations of settled FCC directives, the private plaintiffs in Section 401(b) actions were doing exactly the job that Congress envisaged.

### B. The Policy Objections to Enforcement Are Without Merit and Do Not Apply to the Order in This Case.

The broad purpose of Section 401(b), like other enforcement provisions, is remedial. Congress plainly wanted to achieve prompt and effective enforcement of FCC directives.[36] It is well settled that remedial provisions are to be interpreted liberally to achieve that legislative purpose.[37] In this case, no stretching of statutory language is necessary. Merely reading Section 401(b) in accordance with its terms, to embrace "any [non-money] orders," will assist the FCC in its administration of the Act.

The First Circuit, now echoed by the Maryland Commission, offered a pair of policy objections to allowing Section 401(b) actions to enforce orders entered in FCC rulemaking proceedings. The objections do not support a distinction between orders entered in adjudicatory proceedings and those entered in rulemakings. Moreover, the objections have no conceivable application to the very Preemption Order involved in this case.

[35] Memorandum of the FCC in support of petition for rehearing, July 27, 1984, p. 14, in *New England Telephone and Telegraph Co.* v. *Public Utilities Commission of Maine.*

[36] This aim is evidenced not merely by the express provision for private enforcement but also by the unusual mandatory directive that, if the formal requirements of Section 401(b) are met, the district court "shall" issue an injunction.

[37] E.g., *Peyton* v. *Rowe*, 391 U.S. 54, 65 (1968); *Tcherepnin* v. *Knight*, 389 U.S. 332, 336 (1967).

First, the First Circuit is mistaken in its assumption that adjudicatory orders are inherently precise (and therefore uniquely fit for immediate enforcement in private suits) while, by contrast, orders issued in rulemaking proceedings are likely to be vague and inappropriate for private enforcement. Rulemaking orders may be very precise and adjudicatory orders may be cast in highly general terms. In fact, an agency usually has wide discretion whether to use adjudication or rulemaking in making a particular determination. *SEC* v. *Chenery Corp.*, 318 U.S. 80 (1943). The FCC has made similar preemptive decisions *both* in rulemakings and in adjudications, depending solely on the procedural context in which the preemption issue happened to arise.[38]

Of course, an agency rulemaking order—or an adjudicatory order—may present a court with difficult problems of interpretation. The anti-fraud and proxy disclosure rules of the SEC, which are routinely the basis for private injunctive and damage actions in the federal courts, are notoriously difficult to construe.[39] However, where a court would be aided by the agency's help, it normally has no difficulty in seeking the agency's interpretation, whether a rulemaking or an adjudicatory order is in issue. Agencies including the FCC are regularly asked by courts to construe disputed agency rules or orders, either formally through references under the primary jurisdic-

[38] For example, one of the FCC's most important and generally phrased preemptive rulings was made in a declaratory order concerning connection of telephone equipment to the network. *North Carolina Utils. Comm'n* v. *FCC*, 537 F.2d 787 (4th Cir.), *cert. denied*, 429 U.S. 1027 (1976). Such an order would clearly be classified as an adjudication under the APA. 5 U.S.C. § 554(e). By contrast, another far-reaching preemptive decision, concerning the detariffing of carrier-provided telephones, was made in a rulemaking proceeding where new substantive rules were being formulated. *Computer & Communications Industry Ass'n* v. *FCC*, 693 F.2d 198 (D.C. Cir. 1982), *cert. denied*, 461 U.S. 938 (1983).

[39] See, *e.g.*, *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185 (1976) (Section 10(b) and rule 10b-5 of the Securities Exchange Act prohibiting "fraud or deceit" in securities transactions); *TSC Industries* v. *Northway, Inc.*, 426 U.S. 438 (1976) (SEC proxy rules barring "false or misleading" statements).



tion doctrine or through amici briefs or other less formal means.[40] That opportunity is a complete answer to the First Circuit's concern.[41]

Second, the First Circuit expressed concern that, if orders issued in rulemakings could be enforced under Section 401(b), such an action might be brought against parties who had no knowledge of the order at the time it was entered and could not have protected themselves by seeking timely review of the order in a court of appeals under Section 402(a). However, Section 401(b) provides that, as a prerequisite to an injunction, the district court must find that the order to be enforced was duly served on the disobedient person. Often, as in the present case, the subject is served with or otherwise notified of the FCC order when the order is issued and has ample opportunity, as the state commissions did here, to seek immediate judicial review under Section 402(a).

In any event, rules are commonly enforced in court against parties who never participated in their formulation and may not even have existed when the rules were adopted. The judicial process is flexible enough to permit a belated challenge to an underlying rule where that course is appropriate.[42] However, a party who did not have a prior opportunity to challenge a rule is not given permanent immunity from its enforcement. The problem raised by the First Circuit does not support a refusal to allow enforcement actions merely because an order happens to derive from a rulemaking proceeding.

It should be stressed that *neither* of the concerns of the First Circuit has *any* application to the present case. The Preemption Order is in no way unclear: in substance it is a

[40] *E.g.*, *Carter* v. *AT&T*, 365 F.2d 486 (5th Cir. 1966), *cert. denied*, 385 U.S. 1008 (1967); *Chastain* v. *AT&T*, 351 F. Supp. 1320 (D.D.C. 1972).

[41] Directly on point is *Pacific Fruit Express* v. *Akron, C. & Y. R.R.*, 355 F. Supp. 700, 705-06 (N.D. Cal. 1973), *aff'd*, 524 F.2d 1025 (9th Cir. 1975), *cert. denied*, 424 U.S. 911 (1976), where the District Court directed specific questions to the ICC in an enforcement action brought under the provisions of the Interstate Commerce Act from which Section 401(b) was derived.

[42] See, *e.g.*, *Functional Music, Inc.* v. *FCC*, 274 F.2d 543 (D.C. Cir. 1958), *cert. denied*, 361 U.S. 813 (1959).

directive that SLELG and remaining life methods be permitted in state ratemaking proceedings. Neither the Maryland Commission, nor any of the other commissions who defied the Preemption Order, has ever expressed any legitimate doubt about the meaning of the order; rather, the recalcitrant state commissions have said that they will not obey the Preemption Order because they believe it is unlawful. See p. 5, above.

As for notice, the state commissions had ample opportunity to seek timely review of the Preemption Order under the Hobbs Act. All of the state commissions were served with copies of the order when it was released (92 F.C.C.2d at 888) and over 20 of them joined in a direct review action to challenge the order in the Fourth Circuit. See p. 5, above. Those commissions that failed to join in the Fourth Circuit challenge did so deliberately and not because of any lack of notice as to the existence or contents of the Preemption Order. Whatever strength the First Circuit's concerns might have in other contexts, they do not support the refusal to enforce the Preemption Order in this case.

Increasingly, agency proceedings do not fall into neatly labeled compartments. The FCC makes preemption determinations in both adjudications and rulemakings (see p. 14, above), and the Preemption Order itself arose out of hybrid proceeding that combined rulemaking and adjudication. See p. 3, n.10, above. Where a federal agency has issued a clear order and that order is clearly being disobeyed, the policies favoring prompt and effective enforcement of agency orders apply with equal force, whatever label may be attached to the proceeding that gave rise to the agency order.

There may be cases where an agency order is not appropriate for immediate court enforcement. But as with reviewability, such exceptions must turn on the realities of finality, clarity, and injury, rather than on mechanical classification.[43] Any appraisal of the realities in *this case* makes clear that the Preemption Order was fully suited to immediate enforcement: it was

[43] See *Abbott Laboratories* v. *Gardner*, 387 U.S. 136 (1967); *Toilet Goods Ass'n* v. *Gardner*, 387 U.S. 158 (1967); *Gardner* v. *Toilet Goods Association*, 387 U.S. 167 (1967).



specific, definitive and binding, and its disregard by the Maryland Commission was unquestionably causing immediate and substantial harm.

## II. THE MARYLAND COMMISSION AND ITS INDIVIDUAL MEMBERS ARE "PERSONS" UNDER SECTION 401(b).

The Fourth Circuit held that the Maryland Commission is a "person" subject to an enforcement action under Section 401(b). Six other courts have agreed with this reading of the Act.[44] Furthermore, the Fourth Circuit said that C&P's suit "named not only [the Maryland Commission] but also the officials comprising [the agency] as defendants," and the court held that the commissioners as individuals are "expressly covered" by Section 401(b). 748 F.2d at 881 (Pet. App. at 4a). Each alternative holding is independently sufficient to sustain the District Court's injunction.

### A. The Individual State Commissioners Are "Persons."

The Fourth Circuit correctly determined that the individual Maryland commissioners, specifically named in C&P's suit for injunctive relief, are expressly covered by Section 401(b). Section 401(b) provides that the district courts shall enforce any order of the FCC, except for the payment of money, against "any person" who fails to obey any order of the FCC. The term "person" is defined elsewhere in the Act to include "an individual" (Section 3(i), 47 U.S.C. § 153(i)) and the members of the Maryland Commission are clearly "individuals" in the ordinary usage of that term. Just last Term, this Court reaffirmed the basic canon of construction that, when the terms of a statute are unambiguous, judicial inquiry is ordinarily complete.[45]

[44] These are the Fifth Circuit (744 F.2d at 1115-16) and district courts in the enforcement actions in Louisiana (570 F. Supp at 236), Maine (570 F. Supp. at 1567-68), Wisconsin (slip op. at 7-8), Montana (588 F. Supp. at 7), and Washington (565 F. Supp. at 21). The Vermont District Court disagreed (576 F. Supp. at 493-96).

[45] *Garcia* v. *United States*, 105 S.Ct. 479, 483 (1984). See also *Consumer Product Safety Commission* v. *GTE Sylvania*, 447 U.S. 102, 108 (1980); *TVA* v. *Hill*, 437 U.S. 153, 187 n.33 (1978).

A literal reading of Section 401(b) is also warranted in order to carry out its evident purpose to achieve prompt and effective enforcement of FCC directives under the Act. That Act not only governs carriers and licensees but establishes a framework delineating the respective spheres of authority of the federal and state commissions. Clearly a state agency would be in violation of the Act if it sought to fix interstate rates for a telephone company,[46] or to prohibit use of customer-supplied equipment for communication over the network,[47] or to disregard an order separating interstate from intrastate costs and investment.[48] The states, which are quick to claim rights under the Act, are no less subject to the Act's limitations.

If state regulatory officials exceed their authority as defined by federal law, their actions can severely frustrate federal communications policy.[49] That is why Congress entrusted the FCC with overriding power to determine depreciation and why the courts have upheld the FCC's power to preempt in a variety of contexts. If a state governor or city mayor sought to operate a local radio station without procuring a radio license from the FCC, no one would doubt that an injunction was proper.[50] The Maryland commissioners, in defying the FCC's Preemption Order, stand on no different footing.

For over 50 years, federal courts have issued injunctions against state officials who, under color of state law, were found

[46] See *New York Telephone Company* v. *FCC*, 631 F.2d 1059 (2d Cir. 1980).

[47] See *North Carolina Utilities Commission* v. *FCC*, 552 F.2d 1036 (4th Cir. 1977), *cert. denied*, 434 U.S. 874 (1977).

[48] See *Illinois Bell Telephone Co.* v. *Illinois Commerce Comm'n*, *supra*, 740 F.2d at 587.

[49] See *Capital Cities Cable* v. *Crisp*, 104 S.Ct. 2694, 2703 (1984); *Computer & Communications Industry Ass'n* v. *FCC*, *supra*, 693 F.2d 198; *North Carolina Utilities Commission* v. *FCC*, 537 F.2d 787 (4th Cir.), *cert. denied*, 429 U.S. 1027 (1976).

[50] Section 301, 47 U.S.C. § 301, forbids radio broadcasting by any "person" without an FCC license. No one doubts that this constrains state and city stations as well as private ones. *Cf. City of New York* v. *Federal Radio Comm'n*, 36 F.2d 115 (D.C. Cir. 1929), *cert. denied*, 281 U.S. 729 (1930).



to be acting in violation of federal limitations.[51] *Ex parte Young*, the foundation case in this line of authority, made clear that a state officer cannot claim the protection of the state's sovereign immunity if his action is contrary to federal law. 209 U.S. at 159-60. Although *Ex parte Young* and many later cases involved unlawful actions by state regulators against utilities and carriers, today "it provides the basis for forcing states to desegregate their schools" and the doctrine is "indispensable" to our constitutional jurisprudence. See Wright, *supra* note 51, at 292.

Section 401(b), so far as it is directed against violations of the Act by state officials, mirrors the federal remedy recognized in *Ex parte Young*. Where, as here, the relief sought is merely to "enjoin state officials to conform their future conduct to the requirements of federal law," it is well settled that constitutional concerns are not implicated. *Quern* v. *Jordan*, 440 U.S. 332, 337 (1979).[52] In light of the FCC's Preemption Order, the Maryland commissioners are acting in patent violation of federal law, for preemption by a federal agency is no less a federal command than preemption by Congress itself. See *Fidelity Federal Savings & Loan Association* v. *de la Cuesta*, 458 U.S. 141, 153-54 (1982).

Without directly claiming a violation of the Johnson Act, 28 U.S.C. § 1342, the Maryland Commission and the state amici argue that that statute reflects a general hostility to federal injunctions against state rate orders. In fact, the Johnson Act makes clear that it precludes only a limited class of injunction actions against state rate orders, *i.e.*, those actions

[51] *Ex parte Young*, 209 U.S. 123 (1908); *Florida Department of State* v. *Treasure Salvors, Inc.*, 458 U.S. 670 (1982); *Quern* v. *Jordan*, 440 U.S. 332 (1979); *Hutto* v. *Finney*, 437 U.S. 678 (1978). See C. Wright, *Federal Courts* 292 (4th ed. 1983).

[52] This case does not involve any attempt to seek monetary relief from the state treasury (*Edelman* v. *Jordan*, 415 U.S. 651 (1974)) or any claim that a state officer is acting in violation of *state* law. *Pennhurst State School & Hospital* v. *Halderman*, 465 U.S. 89 (1984).

which meet *each* of four separate conditions.[53] It was not designed to cripple enforcement of FCC orders serving national policy goals but to confine to state courts intrinsically local disputes concerning the reasonableness of utility rates. The Johnson Act is a limited exception to the general rule that federal rights may be enforced in federal courts; in cases where the Johnson Act does not apply, injunctive relief remains available.

It is crystal clear that the Johnson Act does not apply to the present case. First, jurisdiction over the injunction action in the District Court did not rest "solely" upon diversity or the Constitution; [54] and second, the state commission's action does interfere with interstate commerce.[55] The Fourth Circuit and every other lower court that has addressed the Johnson Act in Section 401(b) cases have agreed that the Johnson Act is not applicable.[56] Any construction of the Johnson Act that ignores its precise terms and limited purpose would not only frustrate the private suits that Congress intended to preserve but would also frustrate the Government's own enforcement of the Communications Act and FCC orders as well.

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[53] The Johnson Act applies only where jurisdiction in the injunction suit is (1) "based solely on diversity of citizenship or repugnance of the order to the Federal Constitution" *and* (2) the order does not "interfere with interstate commerce" *and* (3) it has been made after "reasonable notice and hearing" *and* (4) there is an adequate state remedy. 28 U.S.C. § 1342.

[54] In this case, jurisdiction over the suit rests directly upon a federal statute (Section 401(b)) and asserts a violation of a specific federal agency order. See, *e.g.*, *South Central Bell Telephone* v. *Louisiana Public Service Commission*, 744 F.2d 1107, 1123 n.28 (5th Cir. 1984), *appeal filed*, No. 84-870.

[55] Because the telephone plant being depreciated here is used interchangeably for both interstate and intrastate communication, the FCC properly found that inconsistent state depreciation rules would frustrate federal policy designed to promote interstate commerce. *Cf. Public Utilities Commission of Ohio* v. *United Fuel and Gas Co.*, 317 U.S. 456 (1943) (Johnson Act not applicable to state orders impinging on authority of FPC).

[56] See, in addition to the Fourth Circuit's decision (748 F.2d at 881-82 (Pet. App. at 6a-7a)), the Fifth Circuit's decision (744 F.2d at 1123 n.28), and the district court decisions in Louisiana (570 F. Supp. at 233-34), Maine (570 F. Supp. at 1566-67), and Wisconsin (slip op. at 4).



Finally, the Maryland Commission argues that, if the Court finds that Section 401(b) does not embrace state commissions as "persons," then it must follow that Congress must have intended to bar suits against individual commissioners. Md. Br. 20-21. On the contrary, there is no specific evidence in the legislative history that Congress intended to bar suits against *either* state commissions or state commissioners under Section 401(b). If Section 401(b) is read not to include state commissions, that result can rest only upon the linguistic accident that Congress did not specifically name state commissions in its definition of "person," coupled with a policy of narrow construction.

Neither of these considerations bars a suit against state commissioners. They are clearly "persons" under Section 401(b). Such officers, acting under color of state law, have traditionally been subject to federal injunction actions brought to enforce federal rights under the *Ex parte Young* doctrine. And no Eleventh Amendment interests are implicated because "since *Ex parte Young* . . . it has been settled that the Eleventh Amendment provides no shield for a state official" where the charge is that the official is violating federal law under color of state authority. *Scheuer* v. *Rhodes*, 416 U.S. 232, 237 (1974).[57]

### B. The Maryland Commission Is a "Person" Under Section 401(b).

The Fourth Circuit was also correct in its alternative holding that the Maryland Commission is a "person" subject to an enforcement action under Section 401(b). The term "person" is widely construed in federal statutes to include states and state agencies.[58] This is so where the federal statute lays

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[57] See S. Ct. R. 21(1); the Maryland Commission did not assert any Eleventh Amendment objection either in its petition for certiorari or at any stage of the proceedings. See *Patsy* v. *Board of Regents of the State of Florida*, 457 U.S. 496, 515-16 n.19 (1982).

[58] *E.g.*, *Georgia* v. *Pennsylvania R.R.*, 324 U.S. 439, 452 (1945); *Georgia* v. *Evans*, 316 U.S. 159, 160-63 (1942); *United States* v. *Illinois*, 454 F.2d 297, 301 (7th Cir. 1971), *cert. denied*, 406 U.S. 918 (1972); *United States* v. *Massachusetts Bay Transportation Authority*, 614 F.2d 27, 28 (1st Cir. 1980).

burdens on the state, as well as where the state benefits, and where a statute defines "person" to include various entities without mentioning states.[59]

Similarly, in the Communications Act, state agencies have been treated as "persons" for various purposes.[60] Nothing in the linguistic structure of the Act precludes the treatment of state commissions as persons. The definitional language of Section 3(i) is illustrative and not exclusive, as even the Maryland Commission admits. Md. Br. 12-13.[61] Maryland says that the language only extends to "like" entities; but where a state commission is violating an FCC order, it is "like" an "individual . . . or corporation" (Section 3(i)) in this crucial respect. Neither the separate definition of "state commission"

[59] *Ohio* v. *Helvering*, 292 U.S. 360 (1934), illustrates both points, for the Court there held that Ohio was a "person" under the Internal Revenue Code and taxable on its sale of liquor even though "person" was defined as including "a partnership, association, company, or corporation, as well as a natural person." *Id.* at 368. See also *Sims* v. *United States*, 359 U.S. 108 (1959) (a state is a "person" so that United States may levy upon unpaid salaries of state employees to recover federal taxes); *United States* v. *California*, 297 U.S. 175 (1936) (state owned railroad subject to federal safety standards).

[60] For example, Section 405, 47 U.S.C. § 405, provides that "any . . . person" aggrieved by an FCC action may petition for reconsideration, as California and its state commission did when dissatisfied with the original Depreciation Orders which are the origin of this case. See p. 3, above. See also Section 5(c)(4), 47 U.S.C. § 155(c)(4), providing that "any person aggrieved" by an FCC staff decision may seek review by the FCC itself. At several places, the Act directs the FCC to give notice to "the State Commission . . . and [to] such other persons" as the FCC shall direct. Sections 221(a) and (c), 47 U.S.C. §§ 221(a), (c).

[61] See *Pfizer, Inc.* v. *India*, 434 U.S. 308, 312 n.9 (1978) (foreign government is a "person" although not mentioned in definition); *Federal Land Bank of St. Paul* v. *Bismark Lumber Co.*, 314 U.S. 95, 99-100 (1941) ("the term 'including' is not one of all-embracing definition, but connotes simply an illustrative application of the general principle").



in the statute[62] nor any other provision of the statute[63] rules out the treatment of state commissions as persons under the Act.

Here, as elsewhere, a state commission may fairly be treated as a "person" under a federal statute where that outcome is consistent with the purpose of the statute.[64] As we have already shown, the state agencies are actors within the plan of the Communications Act, which imposes limitations upon them just as it confers on them certain authority. See p. 18, above. Through their actions in attempting to regulate carriers, the states can transgress the limitations of the Act and can frustrate its purposes, as surely as any private carrier. See p. 18, above. Indeed, in this very case, the FCC found that the states' disregard of the Depreciation Orders was frustrating the objectives of the FCC in fostering a modern communications network for the country. 92 F.C.C.2d at 877. Plainly, prompt and effective enforcement of the Act was an objective of Congress, and treating the states as "persons" for purposes of Section 401 is consistent with this objective.

To underscore the point, it should be remembered that the term "person" is also used in Section 401(a) which authorizes

[62] The fact that "state commission" has a separate definition (Section 3(t), 47 U.S.C. § 153(t)) proves nothing, because various sections of the Act refer specifically to "state commissions" (*e.g.*, Section 220, 47 U.S.C. § 220), so that it was suitable to have a separate definition to implement those sections. Furthermore, the separate definitions in the statute are not mutually exclusive. In addition to "state commission," the terms "licensee," "corporation," "connecting carrier," and "broadcast station" are all defined separately, yet those entities clearly are "persons" subject to enforcement actions in federal courts.

[63] The juxtaposition of "person" and "state commission" in Section 208, 47 U.S.C. § 208, merely confirms that Congress was especially cautious in one instance to assure that state agencies would be recognized as complainants; it can be matched by other instances in which state commissions are included under sections of the Act that refer only to "person" or refer to "state commissions . . . and . . . other persons." See p. 22, n.60, above.

[64] See, *e.g.*, *Georgia* v. *Evans*, *supra*, 316 U.S. at 161; *Sims* v. *United States*, 359 U.S. 108, 112 (1959); *Ohio* v. *Helvering*, 292 U.S. 360, 370 (1934).

suits by the United States to enforce the provisions of the Act; and Section 401(b), using the same term, provides for suits to enforce FCC orders by the United States or the FCC, as well as private parties. A reading of the Act that excluded state commissions from the term "person" would impair enforcement of the Act and of FCC orders where such suits were brought in federal court by the United States or the FCC.[65] Such a reading would frustrate the objectives of Congress.

The Maryland Commission has argued that the present injunction action constitutes interference with state ratemaking or local affairs and disregards the regime of dual regulation established by the Act. Md. Br. 15-21. This argument confuses the substantive obligation of the states to respect FCC depreciation decisions—at issue in No. 84-871—with the narrower procedural question of enforcement. The substantive obligation of the state commissions has nothing to do with Section 401(b); it rests directly upon the Act's substantive provisions (*e.g.*, Section 220) and the FCC's Preemption Order. To the extent that this substantive obligation affects state ratemaking proceedings and local interests, it is because Congress and the FCC determined that depreciation of telephone plant is so related to interstate interests that local interests must give way to a uniform scheme of federal regulation.[66]

Given the obligation of states to respect FCC depreciation decisions, the question here is whether that federal obligation can be enforced in a federal injunction action under Section 401(b). The settled presumption is that federal rights are normally enforceable in federal court actions unless Congress has specifically provided otherwise. See p. 20, above. Section 401(b) codifies that presumption, where FCC orders are

[65] *Atascadero State Hospital* v. *Scanlon*, 105 S.Ct. 3142 (1985), is clearly distinguishable on this ground, in addition to the fact that in that case monetary relief was being sought from the state.

[66] The depreciation in state agency proceedings is depreciation of telephone-company equipment that is virtually all used interchangeably for interstate and intrastate communication; and the depreciation rates affect the ability and incentive of carriers to invest in new equipment which will be used for both purposes.



violated, without drawing any distinction between state agencies and other violators. It does not intrude upon state authority, in any meaningful sense, to require prompt and effective obedience by state agencies to an outstanding and effective federal order *which applies to them.*

Similarly without merit is the claim that the enforcement of federal orders in federal courts will entangle federal judges in matters beyond their capacity or ken. Md. Br. 38. In most of the Section 401(b) cases brought to enforce the FCC's Preemption Order, the litigation has been straightforward. In such instances, the state agency has admittedly refused to permit the use of SLELG or remaining life; and in almost every case, the state has obeyed the federal injunction when it has been issued. The injunctions have merely required the state to accept FCC-approved depreciation methods and otherwise left the states free to conduct their own ratemaking proceedings under their usual standards.

The only important exception, mistakenly emphasized by the Maryland Commission, is the injunction action brought against the Louisiana Commission. After that injunction was granted, the state commission engaged in what the Louisiana District Court thereafter found to be nothing more than a subterfuge to evade the injunction.[67] The Louisiana episode is atypical because most state commissions do not disregard federal injunctions. It does illustrate how important it is to maintain the possibility of federal injunctive relief to assure that federal orders are obeyed.

[67] The state commission allowed the new depreciation rates but made an offsetting reduction in the rate of return to keep the revenue requirement close to its original level. 570 F. Supp. at 237-38. It did so without any evidence or independent basis for reducing the rate of return beyond a patent attempt to frustrate the federal injunction. *Id.* Quite appropriately, the District Court enjoined this action, not because it violated the FCC's Preemption Order but because it thwarted the injunction itself. *Id.* See brief for the United States as *amicus curiae* in No. 84-483, *et al.*, pp. 11-12.

Finally, there is no general requirement that *state* court remedies be exhausted before a federal requirement is enforced in a federal court against a state official or agency. Compare Md. Br. 20.[68] A federal court, for example, can clearly enjoin a local school board to desegregate local schools without waiting until state court remedies have been exhausted. Congress may make exceptions to this rule and require that certain federal matters be resolved by state courts in the first instance. However, no such congressional exhaustion requirement exists in the present case. Instead, Section 401(b) expresses Congress' intent that violations of FCC orders by "any person" be remedied in federal court.

[68] On the contrary, the "traditional rule" is that state administrative remedies must be exhausted but state judicial remedies need not be. Wright, *supra* note 51, at 293.



## CONCLUSION

For the reasons stated, the decision should be affirmed.

Respectfully submitted,

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October 1985

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## APPENDIX A

### Subscribing Parties

American Telephone and Telegraph Company

Illinois Bell Telephone Company

Indiana Bell Telephone Company

Michigan Bell Telephone Company

New England Telephone and Telegraph Company

New Jersey Bell Telephone Company

New York Telephone Company

The Ohio Bell Telephone Company

South Central Bell Telephone Company

Southern Bell Telephone and Telegraph Company

Southwestern Bell Telephone Company

Wisconsin Bell Inc.

## Rule 28.1 Listing *

Amicus American Telephone and Telegraph Company retains a minority beneficial interest in Cincinnati Bell Inc. held in a voting trust.

Amici Illinois Bell Telephone Company, Indiana Bell Telephone Company, Michigan Bell Telephone Company, The Ohio Bell Telephone Company and Wisconsin Bell Inc. are subsidiaries of American Information Technologies Corporation.

Amici New England Telephone and Telegraph Company and New York Telephone Company are subsidiaries of NYNEX Corporation.

Amici South Central Bell Telephone Company and Southern Bell Telephone and Telegraph Company are subsidiaries of BellSouth Corporation. FiberLAN, Inc. is a partially owned subsidiary of BellSouth Corporation.

Amici Southwestern Bell Telephone Company is a subsidiary of Southwestern Bell Corporation.

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* Counsel understand S. Ct. R. 28.1 to require disclosure only of those subsidiaries or affiliates with outstanding securities in the hands of the public.



## APPENDIX B

**Arkansas**

*Southwestern Bell Telephone Co.* v. *Arkansas Public Service Comm'n*, 584 F. Supp. 1087 (D. Ark.), *rev'd*, 378 F.2d 901 (8th Cir. 1984), *petition for cert. filed*, No. 84-483.

**Iowa**

*Northwestern Bell Telephone Co.* v. *Iowa State Commerce Comm'n*, No. 83-688-A (S.D. Iowa Sept. 27, 1984).

**Kansas**

*Southwestern Bell Telephone Co.* v. *State Corporation Comm'n*, No. 83-4090 (D. Kan. Apr. 8, 1983).

**Louisiana**

*South Central Bell Telephone Co.* v. *Louisiana Public Service Comm'n*, 570 F. Supp. 227 (M.D. La. 1983), *aff'd*, 744 F.2d 1107 (5th Cir. 1984), *appeal filed*, No. 84-870.

**Maine**

*New England Telephone & Telegraph Co.* v. *Public Utils. Comm'n of Maine*, 570 F. Supp. 1558 (D. Me. 1983), *rev'd*, 742 F.2d 1 (1st Cir. 1984), *petition for cert. filed*, No. 84-900.

**Maryland**

*Chesapeake & Potomac Telephone Co. of Maryland* v. *Public Service Comm'n of Maryland*, 560 F. Supp. 844 (D. Md. 1983), *aff'd*, 748 F.2d 879 (4th Cir. 1984), *petition for cert. granted*, No. 84-1362.

**Montana**

*Mountain States Telephone and Telegraph Co.* v. *Department of Public Service Regulation*, 588 F. Supp. 5 (D. Mont. 1983).

**Vermont**

*New England Telephone and Telegraph Co.* v. *Public Service Board of Vermont,* 576 F. Supp. 490 (D. Vt. 1983), *vacated as moot,* No. 84-7051 (2d Cir. Dec. 5, 1984).

**Washington**

*Pacific Northwest Bell Telephone Co.* v. *Washington Utilities & Transportation Comm'n,* 565 F. Supp. 17 (W.D. Wash. 1983), *appeal pending,* No. 83-3746 (9th Cir.).

**Wisconsin**

*Wisconsin Bell, Inc.* v. *Public Service Comm'n of Wisconsin,* No. 84-C-4 (E.D. Wis. Nov. 13, 1984), *appeal pending,* No. 84-3110 (7th Cir.).